IN THE

Supreme Court of the United States

October Term, 1975

No. 75-819

KARL SCHWARTZBAUM,

Petitioner,

—vs.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Karl Schwartzbaum, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, entered on November 7, 1975, which affirmed a judgment of conviction previously entered against him in the United States District Court for the Southern District of New York.

Opinions Below

Petitioner, a manufacturer, was tried alone upon the charge of unlawfully making payments to union representatives. In a separate trial, certain union representatives were convicted of having unlawfully received payments from manufacturers, one of which was the petitioner. Both cases were tried in sequence before the same

district judge, and resulted in convictions. Thereafter, motions for a new trial, based upon newly discovered evidence (Rule 33, F. R. Cr. P.) were filed in both cases. In each case the motion was based upon the discovery of perjury on the part of the chief prosecution witness. Although the district judge denied the motions in separate opinions, those opinions were cross-referenced to each other. The same pattern was followed with respect to a renewal of the new trial motions, based upon the discovery of additional evidence. In the Court of Appeals, the two cases were consolidated for argument. Although the Court of Appeals affirmed the convictions in separate opinions, those opinions were cross-referenced to each other.

In view of the interrelationship of the two cases, *United States* v. *Schwartzbaum* and *United States* v. *Stofsky, et al.*, we have reproduced in the appendix hereto, all relevant opinions in both cases.

The opinion of the Court of Appeals, affirming the judgment of conviction herein, *United States* v. *Schwartzbaum*, — F.2d — (November 7, 1975), is contained in Appendix A, at 1a-12a.* The opinion of the Court of Appeals, affirming the judgment of conviction in *United States* v. *Stofsky*, — F.2d — (November 7, 1975), is contained in Appendix B, hereto, at 13a-35a.

The endorsed order of the district court denying the first new trial motion of petitioner, *United States* v. *Schwartzbaum*, — F. Supp. — (June 24, 1974), is re-

* The Appendix to this petition is bound separately due to its size. It is cited herein as follows: "-a". References preceded by "A." are to the appellant's appendix filed in the Court of Appeals with respect to the instant appeal. References preceded by "Tr." are to the trial transcript, which was annexed to the appellant's appendix, but which retained its original pagination.

produced in Appendix C, hereto, at 36a. The opinion of the district court denying the first new trial motion in *United States* v. *Stofsky*, — F. Supp. — (June 12, 1974), is reproduced in Appendix D, hereto, at 37a.

The endorsed order of the district court denying the second new trial motion of petitioner, *United States* v. *Schwartzbaum*, — F. Supp. — (June 5, 1975), is reproduced in Appendix E, hereto, at 55a. The opinion of the district court denying the second new trial motion in *United States* v. *Stofsky*, — F. Supp. — (June 4, 1975), is reproduced as Appendix F, hereto, at 57a.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was filed on November 7, 1975 (1a).

Questions Presented for Review

Petitioner moved in the trial court for a new trial based upon newly discovered evidence (Rule 33, F.R. Cr.P.), and for a hearing in support thereof. The government admitted and the trial court found that the government's principal and indispensible trial witness perjured himself with respect to the extent of his own misconduct and with respect to matters which, if answered truthfully, would have led the defense to uncover the witness's perjury.

1. Did due process of law and the proper administration of justice require that the motion for a new trial be granted upon the established perjury of the witness?

2. Where it is clear that a government witness has perjured himself with respect to facts relating to his

credibility and with respect to facts relating to the accuracy of his memory, is the defense bound to establish that such newly discovered evidence "probably" would have produced a different verdict or should a new trial be granted if such evidence "might" produce a different verdict?

3. Did the lower courts erroneously conclude that the defense failure to discover the perjury at the time of trial was the result of a lack of due diligence? In this respect, and under the facts of this case, was it improper for the lower courts to hold the defense to a higher standard of perception than that applied to the government's failure to uncover and disclose the same perjury?

4. Was the defense, at least, entitled to an evidentiary hearing at which it would have an opportunity to examine the government witness to determine the extent to which his admitted perjury was motivated by a desire to hide the falsity or inaccuracy of that part of his testimony which inculpated petitioner?

Constitutional, Statutory and Regulatory Provisions Involved

This case involves the Due Process Clause of the Fifth Amendment.

Petitioner was convicted of violating 29 U.S.C. § 186 (a).

A motion for a new trial was brought pursuant to F. R. Cr. P., Rule 33.

Each of these constitutional, statutory and regulatory provisions is reproduced in Appendix G, hereto, at 60a.

Statement of the Case

A. The Charge and its Context

The fur garment industry in New York City is composed of some six hundred union manufacturers and four hundred non-union manufacturers. The union shops are members of a trade organization called the Associated Fur Manufacturers [hereinafter, "The Association"]. The Association employs several individuals called "labor adjusters" who have as their function the supervision of conditions at the shop level and who represent the manufacturers in connection with the day to day problems that arise with the workers' organization, the Furrier's Joint Council [hereinafter, "The Union"].

For many years, until September, 1970, Jack Glasser the Government's principal witness, was a labor adjuster with 115 shops under his supervision. One of Glasser's shops was K. J. Schwartzbaum, Inc., owned by petitioner (3a-4a).

At the shop level, the Union is represented by a "business agent". During the initial period covered by the indictment herein (late 1969), one of the business agents, was Harry Jaffee, and one of the shops to which he was assigned was the Schwartzbaum firm (5a).

A contract between the Association and the Union governed the conditions of employment for Union members and related matters. Under the contract, whenever a business agent visited a Union shop to investigate conditions there, he was required to be accompanied by a representative of the Association, normally the labor adjuster (3a; Tr. 48-9, 95-6, 261, 266; Gov. Exhibit 2, Article 18, § 4).

The Union contract contains a provision which prohibits all members of the Association from sub-contracting work to non-union shops. Another provision prohibits members from importing fur garments from outside the United States. Under the contract, if an employer violated either of these provisions, he was subjected to the possibility of a fine or other labor action (3a). It was the function of the labor adjuster to seek the best possible disposition of complaints made against manufacturers. At hearings, he would represent the manufacturers' interests. If complaints reached the hearing stage, the Union's interest would be represented by Charles Hoff, Assistant Manager of the Union (3a-4a). There was no evidence in this case that petitioner ever met or spoke with Hoff. Nevertheless, the indictment charged that, during 1969 and 1970, petitioner made a total of four payments, of $150.00 each, to Hoff for the purpose of inducing Union non-action with regard to the Schwartzbaum firm in relation to violations of the above noted contract prohibitions (1a, 4a). The labor adjuster, Glasser, testified that he was the conduit for those payments (4a).

B. The Trial Proof

The trial proof established that, in 1968, petitioner found it difficult to compete in the fur industry and decided to reduce his costs by sending some of his work to non-union shops for the creation of fur garments, and by importing finished garments, all in violation of the Union contract. Payments for such non-union work were accomplished by means of a private checking account which enabled the firm to bypass the books and records that would normally be available for Union inspection (4a). There was no claim at trial that this process involved any element of criminality or tax avoidance (4a).

In July, 1970, prior to any investigation by the government, officials of the Association conducted an investigation of Glasser. Although he denied participation in or awareness of payments to Union officials in behalf of manufacturers, he was discharged from his employment (4a, 18a). At petitioner's trial, Glasser attributed the commencement of his troubles to the fact that one of the manufacturers "turned *me* in" (Tr. 110).

Almost two years later, in April, 1972, Glasser was questioned by a Federal Strike Force attorney in the Southern District of New York, and denied any knowledge or participation in a scheme to pay Union officials (Tr. 94, 166-7).

Thereafter, *transactional* immunity was conferred upon Glasser, and he commenced to allege that he had been a go-between for the transfers of payments from six manufacturers (including petitioner) to Union officials for the purpose of having Union officials disregard contract violations. He admitted to keeping for himself up to fifty percent of such payments (17a, fn. 5).

An indictment was subsequently returned against four Union officials (*United States* v. *Stofsky, et al.*) and another indictment was returned against four manufacturers, including petitioner. Glasser testified at the *Stofsky* trial, which ended on February 28, 1974, one month prior to the commencement of petioner's trial.*

Glasser's basic story was that, during the period from April, 1967 to December, 1968, he was independently approached by six different manufacturers who wished to engage in subcontracting or importation, but who wanted to avoid any difficulties which might otherwise

* Petitioner was granted a severance from the other three manufacturers since there was no proof that the activity alleged against each of them was connected.

result if they did so. Periodic payments were, allegedly, made to Glasser, who would then pay a part over to union officials, and keep the balance for himself.

According to Glasser, his first contact with petitioner concerning such an arrangement was in May, 1968. The opinion of the Court of Appeals recounts Glasser's version of subsequent events as follows:

> "As recounted by Glasser, Schwartzbaum told him at that meeting that he had been contracting and asked whether there was any way to secure the cooperation of the Union. Glasser, who had previously relayed money from other manufacturers seeking absolution for contracting violations, spoke the following day to Charles Hoff, assistant manager of the Union. Hoff consented to a similar arrangement for Schwartzbaum whereupon Glasser returned to KJS and told the appellant, "I have the okay from Charlie Hoff." Glasser added that over the next two years he received six installments of $300 each from Schwartzbaum and that each time he forwarded one half of that sum to Hoff, identifying the appellant as its source. * * * "

At petitioner's trial, Glasser adamantly insisted on direct and cross-examination that the firms which he identified were the only firms with which he had such dealings. Thus, on direct examination by the government, Glasser testified as follows:

> "Q. Mr. Glasser, you mentioned that in addition to the payments from Mr. Schwartzbaum which you passed on to Mr. Hoff, you had also transmitted payments to Hoff from I believe two other firms, Sherman Brothers and Chateau. Have you ever accepted payments from any other fur manufacturers which you transmitted to any official of the furrier's union? A. Yes I did.
>
> "Q. What firms were those? A. There was a firm called Corrina Furs, there was Breslin, Baker there is one other now and I just can't remember his name. I just can't recall. There was one other. *There were five firms altogether*" (Tr. 80) [Emphasis added].

Similarly on cross-examination, Glasser adhered to these contentions (Tr. 84-5).

Although Glasser claimed that he turned fifty percent of the payments that were made to him over to one or the other of the Union officials, he vaccilated throughout petitioner's trial on the question of whether he had told the manufacturers, particularly petitioner, that he was making such payments to Union officials.*

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* At Tr. 191-3, upon cross-examination, Glasser testified as follows:

> "Q. Mr. Glasser, you testified yesterday that you actually told Mr. Schwartzbaum the name of the Union official who gave the okay? A. I don't know if I did tell it to him. I don't know.
>
> * * * * *
>
> "Q. Let's find out about this respect: did you ever testify at any time, under oath, that you told Mr. Schwartzbaum the name of the Union official? A. I don't know if I did. I cannot recall that I testified to it or that I didn't.
>
> "Q. And today you are not even sure as to whether or not you had ever mentioned him? A. To Mr. Schwartzbaum specifically, Mr. Hoff?
>
> "Q. Yes. A. No, I am not sure that I did.
>
> "Q. And it could be that you didn't tell it to him? A. Possibly that I didn't tell it to him, that it was Mr. Hoff, yes."

See also: Tr. 193-201. On re-direct examination, government counsel was only able to rehabilitate Glasser's testimony to the following extent: "I came back to Mr. Schwartzbaum and I said, I have had a conversation with Mr. Hoff. He has said okay. You can go ahead and do it." (Tr. 229). Notably, no mention of payment to Hoff was made.

At the trial, the government sought to corroborate Glasser's testimony by reference to an allegedly similar act, not charged in the indictment. Harry Jaffee, a business agent of the Union, testified that in October or November, 1969, Glasser gave him $50 and told him to ignore anything he might see at the Schwartzbaum shop. Jaffee had no knowledge as to whether Schwartzbaum was aware of the payment. (5a; Tr. 267-293).

The government additionally sought to corroborate Glasser's testimony by virtue of an alleged admission made by petitioner to a loan officer of Chase Manhattan Bank. At or about the time that the indictment was filed against petitioner, the matter received some newspaper publicity. The Schwartzbaum firm had a $400,000 line of credit with the Bank. Albert Chambers, the loan officer, testified that during a meeting with petitioner, petitioner mentioned the indictment ". . . and that he had made payments to Union officials." (5a). In view of various patently and concededly erroneous aspects of Chambers' testimony, it was the defense position that petitioner had only been recounting the charges of the indictment to Chambers, and that Chambers erroneously interpreted those comments as admissions.

C. The Newly Discovered Evidence

At petitioner's trial, as noted *supra*, Glasser claimed that he had received payments from only five other manufacturers and that his share of those payments aggregated a total of $5,043.00 (A. 49-50).

At the prior trial of the Union officials in *Stofsky*, counsel for those defendants had subpoenaed bank records which led to the disclosure that Glasser had financial assets in excess of $100,000.00. Unfortunately, the bank's response to the subpoenas had not included those records

which would have revealed to counsel that, during the three and a half year period covered by this indictment, Glasser had made large and frequent *cash* deposits to his various bank accounts. Glasser explained at the *Stofsky* trial that the bulk of his resources were derived from an inheritance which had been received by his wife a number of years prior to the events involved herein. That claim, now known to be false, was corroborated by Glasser's wife, who was called as a Government witness (20a). This explanation was not inconsistent with the available bank records. Thus, no significant issue was made at petitioner's trial with respect to Glasser's bank accounts. The issue had been a dead end at the *Stofsky* case and there was no reason to believe it would be otherwise in petitioner's case.

Following petitioner's trial, petitioner's counsel became aware of the existence of additional bank records which revealed the cash nature of Glasser's bank deposits. Those records established that, during the three and a half year period covered by the indictment, Glasser's total *cash* deposits amounted to at least $56,701.05. That disclosure prompted both petitioner and the defendants in the *Stofsky* case to make a motion for a new trial grounded upon newly discovered evidence. In preparing its response to the motions, government counsel interviewed Glasser and his wife. At first they claimed that the cash deposits resulted from the sale of Mrs. Glasser's jewelry (A. 116-7); however, Glasser eventually admitted that at least one-half of the deposits were the proceeds of payments made by other manufacturers and the balance was from legitimate transactions. He produced no documentation to support the allegedly legitimate portion of those funds. The government incorporated all of Glasser's admissions and other claims into a reply affidavit *executed by government counsel.* The government did not include in its reply any affidavit executed by Glasser (A. 77-87; 116-7).

Petitioner's motion for a new trial was denied by the trial court (30a), as was a motion for a new trial made in behalf of the Union officials (37a).

After petitioner's brief was filed in the Court of Appeals, the government provided the defense with additional information in which it was disclosed that it had obtained copies of other Glasser financial records from several banking institutions, and had concluded that Glasser's most recent version, which alleged that half of his savings were legitimate, was not correct.

By the government's own admission (A. 198) and statistics (A. 211-222), Glasser's *known* deposits from unexplained sources during the period of 1962-1963 were as follows:

Cash	$ 91,154.11
Check	23,713.89
Undetermined	42,820.83
TOTAL	$157,688.83

At the trial, Glasser had testified that he had received a total of $14,000.00 from five manufacturers during the period of 1967-1969, and that he had given most of it to Union officials, retaining only $5,043.00 for himself (Tr. 69-93; A. 49-50). In contrast, his *known* unexplained bank deposits for the period 1967-1970, were as follows:

	Cash	*Checks*	*Undetermined*	*Total*
1967-9	$57,089.05	$6,481.89	$3,432.47	$65,723.51
1970	14,200.00	2,848.23		17,048.23
			TOTAL	$84,71.74

Based upon these additional revelations, petitioner and the defendants in the *Stofsky* case renewed their new trial motions in the district court. The motions were, again, denied (55a, 57a).

D. The Value of the Newly Discovered Evidence.

At trial, the government had a three-fold burden of proof. It had to establish: (1) that petitioner made payment to Glasser; (2) that petitioner intended that Glasser pay over all or part of those funds to Union officials; and (3) that Glasser actually made the payments in question to a Union official. Indeed, the Trial Court charged the jury that they had to find the existence of each of these facts beyond a reasonable doubt before they could convict petitioner (Tr. 424). Thus, in assessing the reliability of Glasser's recollection and the truthfulness of his testimony, the jury was confronted with five possibilities, only the last of which would have justified a verdict of guilt:

1. Petitioner made no payments to Glasser;

2. Petitioner made payments to Glasser under the impression that he was stifling the self-policing function of the *manufacturers'* organization and that the money was, in fact, being kept by Glasser or being passed on to Glasser's superiors within that organization *;

3. Petitioner made payments to Glasser with the impression set forth under possibility #2, but unbeknownst to petitioner, Glasser was distributing some of this money to Union officials;

4. Petitioner was making payments to Glasser under the impression that he was distributing some of the money to Union officials, but Glasser, in fact, kept all the money for himself;

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* It was certainly not within the interest of the other members of the trade Association to have some firms undercutting them on overhead. Payments made to prevent action by the trade Association would not be violative of 29 U.S.C. § 186(c), which is concerned solely with payments to union representatives.

5. Petitioner made the payments to Glasser under the impression that Glasser was distributing the money to Union officials and Glasser did, in fact, distribute some of the money to Union officials.

Glasser's large deposits, if known to the defense at the time of trial, would have provided solid evidence for the defense contention that any monies received by Glasser had been kept by him rather than shared with Union representatives. Moreover, if it had been known to the defense at the time of trial that Glasser was receiving payments during this period from perhaps one hundred or more manufacturers, rather than merely the six claimed at trial, then Glasser's alleged recollection of having told petitioner that money was being paid to Union officials, would have been severely undermined. As it was, Glasser's trial testimony vaccilated on the issue of whether he had actually informed petitioner that payments were made to the Union official (Hoff) in question. (*Supra*, p. 9).

Reasons for Granting the Writ

The instant case presents several important questions relating to the due process rights of convicted defendants and the proper administration of justice in the Federal Courts. The government has conceded, and the District Court and Court of Appeals have found, that an indispensable prosecution witness perjured himself on direct and cross-examination. The perjury related to the scope of his own criminal misconduct and to defense lines of inquiry which would have uncovered that conduct if the witness had responded truthfully.

Notwithstanding these findings, the motion for a new trial was denied without giving the defense any opportunity to examine the witness in question at an evidentiary hearing. The Court of Appeals has offered the following reasons as justification for the denial of the motion without a hearing:

(1) The demonstrated perjury was not as to the guilt or innocence of the petitioner (9a-10a);

(2) The new standard in the Second Circuit for the grant of a new trial on the ground of newly discovered evidence of perjury is whether the evidence is "of such a nature that it would *probably* produce a different verdict in the event of a new trial", and the Court found that the evidence herein does not rise to that standard (10a);

(3) It has not been demonstrated that petitioner's trial counsel, by the exercise of due diligence, would not have uncovered the perjury at the time of trial (8a-9a).

Petitioner respectfully submits that these findings are not supported by the evidence and that the legal principles applied by the Court of Appeals are in conflict with principles enunciated by other circuits. Since such issues are likely to recur in other cases, this Court should review the holding of the Court of Appeals not only for the purpose of doing justice to petitioner, but also for the purpose of providing the lower Federal courts with guidance.

I

It is clear that specific instances of conduct of a witness, even though not the subject of conviction, are proper subjects of cross-examination "if clearly probative of truthfulness or untruthfulness", *Rules of Evidence for the United States Courts and Magistrates*, Rule 608(b). *A fortiori*, this would be the case where, as here, the witness, after trial, has admitted his perjuries to government counsel, who vouched for his credibility, and where his perjury concerned the course of conduct under litigation. As stated in *Wigmore on Evidence*, Volume 3-A, § 957:

> "*Willingness to Swear Falsely.* A willingness to swear falsely is beyond any question admissible as negativing the presence of that sense of moral duty to speak truly which is at the foundation of the theory of testimonial evidence."

In *Napue* v. *Illinois*, 360 U.S. 264 (1959), this Court held:

> "The jury's estimate of the truthfulness and reliability of the government witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." 360 U.S. at 269.

It has been widely recognized that cross-examination as to the "trait of veracity" and as to "a propensity to disregard the obligation of an oath" is always material to the trial of a criminal case, unlike other types of impeachment which go merely to the general character of a witness.* Indeed, this Court has held that previously undisclosed evidence of perjury by a government witness was so material to the integrity of the fact finding process that a new trial was required, even where there was no evidence of suppression by the prosecution, *Mesarosh* v. *United States*, 352 U.S. 1 (1956); *Communist Party* v. *Subversive Activities Board*, 351 U.S. 115 (1956).

In *Mesarosh*, evidence of incidents of suspected perjury by the government witness was discovered after the trial and conviction of the defendant. All but one of the incidents of suspected perjury by the government witness had occurred *after* the trial, and the one pre-trial example of perjury had occurred in a State court proceeding of which the government concededly had no knowledge at the time of trial. Nevertheless, it was held that a new trial was required in view of the fact that the confessed perjuror was a government informer and professional

witness. Under such circumstances, "the integrity of a criminal trial in the Federal courts" is involved (352 U.S. at 3). We submit there is no distinction of substance between Glasser and the witness in *Mesarosh*. By its grant of transactional immunity to him, and by its use of him to secure indictments against a substantial number of individuals, the government has vouched for Glasser to an extent substantially beyond that normally accorded to a trial witness. That Glasser may have deceived the government does not diminish the pollution which he introduced into the fact finding process, but rather intensifies it.

As already noted, the newly discovered evidence goes beyond the issue of Glasser's willingness to tell the truth. It goes directly to the substance of his testimony. Was Glasser capable of recalling what he had told petitioner, i.e., capable of distinguishing his dealings with numerous other manufacturers from his dealings with petitioner? If the cash receipts which he banked were the results of dealings with other manufacturers, as is now admitted, then simple mathematics indicates that he was probably dealing with eighty or one hundred such manufacturers. At trial, the jury was aware of his dealings with only six manufacturers, since he perjured himself in limiting the total to that number.

Glasser's memory problems at trial were attributed merely to the passage of time. Nevertheless, he eventually alleged that he had specific recollections concerning his conversations with petitioner. If the newly discovered evidence would have been available to the defense at trial, it would clearly have supported the defense contention that Glasser could not reliably recall what he had told

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* *United States* v. *Provo*, 215 F.2d 531, 537 (2d Cir., 1954); *Simon* v. *United States*, 123 F.2d 80, 85 (4th Cir., 1941); *United States* v. *Kubacki*, 237 F. Supp. 638 (S.D. Pa., 1965); *Lyda* v. *United States*, 321 F.2d 788, 793 (9th Cir., 1963); *United States* v. *Segelman*, 83 F. Supp. 890, 893 (W.D. Pa., 1949).

to petitioner or whether Glasser had kept all of petitioner's money for himself. The basis and reliability of a witness's ability to recall goes directly to the substance of his testimony. *Napue* v. *Illinois, supra.* Since, in the present case, it was the only line of defense available, it would certainly have been exploited to the fullest extent. *See*: *Wigmore on Evidence*, Volume 3-A, §§ 993-995.

As stated by the Second Circuit, itself, in *United States* v. *Miller*, 411 F.2d 825, 832 (2d Cir., 1969), "there was a significant chance that this added item, developed by skilled counsel . . ., could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction."

II

In the related appeal, *United States* v. *Stofsky* (13a, *et seq.*), the Court of Appeals repudiated the so-called *Larrison* test which requires that, in instances of demonstrated perjury, a new trial will be granted if, without the false testimony, the jury "*might* have reached a different conclusion." *Larrison* v. *United States*, 24 F.2d 82, 87 (7th Cir., 1928). The Court of Appeals has now adopted the rule that, despite a demonstration of perjury by a prosecution witness, the defense must demonstrate that in the absence of such perjury they "*probably*" would have returned a different verdict. (26a-30a).

The Court of Appeals has acknowledged that its new standard is in conflict with the existing rule in several other circuits (26a, fn. 9).*

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* *See*: e.g., *United States* v. *Anderson*, 509 F.2d 312, 327 n. 105 (D.C. Cir., 1974), *cert. denied*, 420 U.S. 991 (1975); *United States* v. *Johnson*, 487 F.2d 1278, 1279 (4th Cir., 1973); *United States* v. *Meyers*, 484 F.2d 113, 116 (3d Cir., 1973); *United States* v. *Briola*, 465 F.2d 1018, 1022 (10th Cir., 1972), *cert. denied*, 409 U.S. 1108 (1973); *United States* v. *Curran*, 465 F.2d 260, 264 (7th Cir., 1972); *United States* v. *Strauss*, 443 F.2d 986, 989 (1st Cir.), *cert. denied*, 404 U.S. 851 (1971); *United States* v. *Smith*, 433 F.2d 149, 151 (5th Cir., 1970).

In rejecting the former rule, the Court of Appeals stated as follows:

> "[T]he test, if literally applied, should require reversal in cases of perjury with respect to even minor matters, especially in light of the standard jury instruction that upon finding that a witness had deliberately proffered false testimony in part, the jury may disregard his entire testimony. Thus, once it is shown that a material witness has intentionally lied with respect to any matter, it is difficult to deny that the jury, had it known of the lie, 'might' have acquitted. We recognize that those who have professed adherence to the Larrison test do not appear to share our concern over the problems arising from its speculative nature. * * *" (27a).

In fact, the "probability" test is no less speculative than the "might have" test. We respectfully submit that the issue to which this Court should address itself is whether due process of law and the proper administration of justice in the Federal courts will permit a conviction to stand where it might have been the result of concededly perjurious testimony. The willingness of the Second Circuit Court of Appeals to permit such a state of affairs to exists flies in the face of the oft-quoted statement in *People* v. *Savvides*, 1 N.Y. 2d 554 at 556 (1956): "The administration of justice must not only be above reproach, it must be beyond the suspicion of reproach." *See also*: *Mesarosh* v. *United States, supra.*

In *Savvides, supra*, which involved a prosecutor's failure to disclose a witness's perjury, Judge Fuld held as follows:

> "It is of no consequence that the falsehood fell upon the witness's credibility rather than directly upon defendant's guilt. A lie is a lie, no matter

> what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. Nor does it avail respondent to contend that defendant's guilt was clearly established or that disclosure would not have changed the verdict. The argument overlooks the variant functions to be performed by jury and reviewing tribunal. 'It is for jurors, not judges of an appellate court such as ours, to decide the issue of guilt.' People v. Mleczko, 298 N.Y. 153, 163. We may not close our eyes to what occurred; regardless of the quantum of guilt or the asserted persuasiveness of the evidence, the episode may not be overlooked. * * *" 1 N.Y. 2d at 557.

The issue is not significantly different merely because the prosecutor in the instant case did not have actual knowledge of Glasser's perjury through the course of two trials. If the jury had known of Glasser's prior perjury, of the many manufacturers with whom he had had such dealings, and of the mass of money he had accumulated, they could well have rejected his testimony all together or could have concluded that his testimony did not establish guilt to the exclusion of the four possibilities of innocence (*supra*, p. 13), beyond a reasonable doubt.

To require a defendant to establish to a trial or appellate judge that the jury would probably have acquitted him, is to require an impossibility. Such a standard effectively leaves the resolution of the problem to the whim and caprice of the trial judge. It should be rejected by this Court as being violative of due process and as being unworthy of the administration of justice in the Federal courts.

III

The Court of Appeals also taxes trial counsel with a lack of due diligence (8a-9a). This Court does not appear to have passed upon the "due diligence" requirement which has been judicially engrafted upon the requirements of Rule 33, F. R. Cr. P.

Petitioner does not contend that the defense may close its eyes to available evidence or that the defense does not have an investigative responsibility. We respectfully submit, however, that where, as in the present case, a prosecution witness has perjured himself both as to immediately relevant areas of inquiry and as to all lines of inquiry which would disclose his initial perjury, the defense cannot be faulted for not tracking down every possible lead. Any witness may present a hundred different areas of investigation which, if followed, might have a telling effect upon his credibility. Hardly any defendant has the resources or the time to follow such leads.

In its brief in the Court of Appeals in the *Stofsky* case (Docket No. 74-1860), the trial of which preceded the trial in the present case, the government stated as follows with respect to the inquiries made in that case concerning Glasser's finances:

> "Trial commenced on February 11, 1974 and on that date, pursuant to an subpoena *duces tecum*, Glasser made available to defendant's counsel a copy of his 1972 Federal joint income tax return (DX H) which declared $6,151.00 in interest payments from several savings banks [footnote omitted]. Glasser was called to testify on February 13 . . . and his testimony continued through February 14. Mrs. Glasser testified as a government witness on February 15.

"On February 14, defendant's counsel cross-examined Glasser concerning the source of the $120,000 in deposits at the three savings banks indicated on Glasser's 1972 return, which had given rise to the interest payments reported thereon. Glasser testified that most of that $120,000 had been inherited by his wife and had been deposited in savings accounts a long time ago. (A. 163a, 165a-166a, 329); and that from 1967-1969 he had received from the Union manufacturers a total of approximately $15,000 to $16,000, of which he had kept approximately $5,000 (A. 167a). In her testimony the next day, Mrs. Glasser affirmed that in 1940, at her fathers' death, she had inherited approximately $60,000; and that in 1944, at her mother's death, she had inherited an additional $30,000 to $40,000; and that, accordingly, she and Mr. Glasser had $100,000 in savings accounts as early as 1945 (A. 181a)." (Government's Brief in *United States* v. *Stofsky, et al.*, *supra*, at pp. 47-48).

In its brief in *Stofsky*, the government went on to describe how, during the course of the *Stofsky* trial, defense counsel in that case obtained some of Glasser's bank records, none of which revealed that deposits had been made in *cash*. The government described the events in the *Stofsky* trial, following the receipt of those records, as follows:

> "The transcript [of bank records] received by defendant's attorney on February 20 showed that the Glassers had deposited $38,156.97 in savings accounts at the East New York Savings Bank during the years 1967-1970. Glasser was recalled by the government and vigorously cross-examined by defendant's counsel on the basis of his tax returns

for 1967 through 1971 supplied that day by the government to defendant's counsel (Tr. 956). Although the principal thrust of that examination sought to establish that Glasser had pocketed entirely any and all payoffs he had ever received from manufacturers, defendant's counsel made no use of the transcript that day and never sought thereafter to have Glasser recalled for further cross-examination (A. 328a-332a). Moreover defendant's counsel did not offer this transcript in evidence on defendant's own case to impeach the testimony of the Glassers concerning the source of the funds in their savings accounts. Defendant's counsel did choose to introduce at trial for this purpose probate records of the estates of Mrs. Glasser's parents (A. 601a-602a; DXs AM, AN), indicating that she had received from the estates of her father and mother approximately $1200 and $1600, respectively." (Government's Brief in *United States* v. *Stofsky, et al., supra*, at p. 48).

In the present case, the Court of Appeals notes that defense counsel had access to the *Stofsky* trial record at the time of petitioner's trial and could have, but did not, pursue the area of inquiry described *supra* (9a). However, an examination of the above noted facts would indicate to any reasonable person that the "key" had been turned in the prior trial, but had not opened the door for any kind of effective attack on Glasser. It appeared to petitioner's counsel as though both defense counsel and the government in the prior trial had had access to the bank records, and that Glasser had been interrogated to the fullest extent imaginable, all to no avail. Under these circumstances, it is respectfully submitted, neither petitioner nor his attorney can be faulted for failing to follow the same path which had so unsuccessfully been pursued in the prior trial. That path had been blocked by Glasser's perjury as well as that of

Glasser's wife, and had been hidden by the bank's failure to reveal that it still possessed the cash deposit records.

It is certainly true that, if anything, the government had in its possession far greater knowledge of Glasser's finances than did defense counsel. The same government attorneys tried both cases. If the defense herein should have been alerted to the evidentiary possibility of the bank records, that conclusion applies, *a fortiori*, to the prosecution, who repeatedly sponsored Glasser as a witness. However, in assessing whether the government had negligently failed to follow through upon an investigation of its own witness, the Court of Appeals held as follows:

> "We do not employ the omniscience of a monday morning quarterback as the standard for determining what investigation should have been made by the government. Although a diligent prosecutor, in the interest of protecting himself against surprise on the part of his principal witness, might well have audited Glasser's finances before putting him on the stand, there was no obligation to do so, since the government, in February, 1974, did not have reason to believe that Glasser, blessed with transactional immunity, would have any incentive to engage in falsehoods concerning his own monetary affairs. * * *" (23a)

The instant case uniquely juxtaposes the diligence requirements placed upon the prosecution and the defense. This Court is, therefore, presented with the issue of whether the failure of defense counsel to possess such omniscience with respect to the cleverly committed and compounded perjury of two government witnesses (Glasser and his wife) at a prior trial, constituted a lack of diligence sufficient to deprive petitioner of an opportunity to a new trial free of such perjury.

IV

The district court declined to grant petitioner an evidentiary hearing at which Glasser would be called as a witness for the purpose of determining the extent and reason for his now-admitted perjury. In opposing the motion for a new trial, the government did not submit any affidavit or verbatim statement from Glasser. Instead, government counsel interviewed Glasser, who eventually admitted his perjury, and his admissions were included in an affidavit of government counsel (A. 23, 28, 31, 77, 88, 101, 194, 267). Nowhere does the government offer Glasser's reasons for *why* he perjured himself. That question should have been the subject of careful cross-examination by defense counsel at an evidentiary hearing. In the absence of such an examination, the defense was completely deprived of any opportunity to demonstrate the full ramifications of the *admitted* perjury.

In resolving the motion purely upon the hearsay affidavit of the prosecutor, the lower courts committed clear error and the case should be remanded for a hearing, *United States* v. *Keogh*, 391 F.2d 138 (2d Cir., 1968); *Berger* v. *United States*, 295 U.S. 78 (1974); *United States* v. *Zbrowski*, 271 F.2d 661, 668 (2d Cir., 1959); *Napue* v. *Illinois*, 360 U.S. 264, 269-270 (1959); *Dunn* v. *United States*, 245 F.2d 407 (6th Cir., 1957); *Smith* v. *United States*, 259 F.2d 125 (9th Cir., 1958); *United States* v. *Derosier*, 229 F.2d 599 (3d Cir., 1956); *James* v. *United States*, 175 F.2d 769 (5th Cir., 1949).

It is respectfully submitted that any fair-minded individual, when confronted with the sordid history of Glasser's brazen perjury, would demand an open hearing for the purpose of ascertaining the truth. The failure to grant such a hearing negates even the appearance of justice. Instead, it appears as though every effort is being made "to keep the lid on" the possibility that Glasser's testimony at such a hearing would undo the government's case.

CONCLUSION

For all of the above reasons, the petition for a writ of certiorari should be granted, the judgment of conviction should be reversed, and a new trial should be granted; in the alternative, the case should be remanded to the district court for an evidentiary hearing as to the newly discovered evidence.

Respectfully submitted,

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